In the Supreme Court of the United States

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No. 71-1119

INDIANA EMPLOYMENT SECURITY DIVISION, et. al.,
Appellants,

vs.

ESSIE B. BURNEY,
Appellee.

On Appeal From the United States District Court for the Northern District of Indiana Fort Wayne Division

Motion to Affirm

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Appellee, pursuant to Rule 16(1)(c) and (d) of the Rules of the Supreme Court of the United States, moves that the judgment of the United States District Court for the Northern District of Indiana be affirmed on the ground that it is manifest that the questions on which the decision of this case depends are so unsubstantial and the decision below is so obviously correct as not to need further argument.

QUESTIONS PRESENTED

1. Whether the Indiana unemployment compensation procedure, which suspends the payment of unemployment compensation benefits to eligible recipi-

ents for several months pending an evidentiary hearing, violates the "when due" requirement of the Social Security Act, 42 U.S.C. § 503(a)(1).

2. Whether the Indiana unemployment compensation procedure, which delays an evidentiary hearing until several months after the suspension of a continued claim recipient's benefits, violates the "fair hearing" requirement of the Social Security Act, 42 U.S.C. § 503(a)(3).

3. Whether this Court's ruling in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) that a state must afford a due process hearing prior to terminating vitally needed governmental benefits applies to the state termination of unemployment compensation benefits, which this Court has found serve "to maintain the recipient at subsistence levels." *California Department of Human Resources Development* v. *Java*, 402 U.S. 121, 131-32 (1971).

STATEMENT OF THE CASE

This action was originally filed in the United States District Court by plaintiff Ronald M. Hiatt representing a class of persons who applied for unemployment compensation benefits, were determined eligible for them by the Indiana Employment Security Division (hereinafter the "Division"), and whose benefits subsequently were suspended without a prior evidentiary hearing. The issue presented by plaintiff

Hiatt, whose benefits were suspended pending an employer's appeal regarding his initial eligibility, was identical to the issue decided by this Court in *California Department of Human Resources Development* v. *Java*, 402 U.S. 121 (1971), which held that such suspensions violate the Social Security Act's requirement that state unemployment benefits be paid "when due." 42 U.S.C. § 503(a)(1). The court below ruled in favor of plaintiff Hiatt and his subclass on the basis of *Java*, and the Division has not appealed from that portion of the decision.

This appeal concerns the issues presented by an intervening plaintiff, Essie B. Burney and the subclass she represents, who challenge the suspension of their unemployment benefits pending an evidentiary hearing on the question of their continued eligibility.

Mrs. Burney and her class are wage earners who involuntarily lost their last jobs and have not yet secured new employment.[1] Prior to their recent loss of employment, they earned sufficient wages in employment covered by the Indiana unemployment compensation program to qualify for the receipt of unemployment benefits. They filed unemployment compensation claims and, after a thorough and lengthy investigation by the Division,[2] were determined eligi-

[1] *See* IND. ANN. STAT. §§52-1538a-b, 52-1539 (Burns 1964 Repl., 1971 Supp.).

[2] This procedure is described in detail in California Department of Human Resources Development v. Java, 402 U.S. 121, 125-28 (1971). *See* Indiana Employment Security Division, Unemployment Compensation Claims Manual (hereinafter "Manual") §13000 et. seq.

ble for benefits for a fixed number of weeks. They were then scheduled for periodic interviews, usually at five or ten week intervals, and, thereafter, were regularly paid benefit checks each week.

Sometime later, their benefits were summarily suspended by a Division official. Disputing their suspensions, they requested evidentiary hearings before Division Appeal Referees. IND. ANN. STAT. §52-1542a (e) (Burns 1964 Repl., 1971 Supp.). Between the suspension of their benefits and the decision of the Referee, a period usually lasting many months,[3] payment of unemployment benefits was withheld. When finally afforded an evidentiary hearing, almost 50% were found to have been fully eligible and hence improperly deprived of benefits.[4]

Plaintiff Burney, for example, lost her job in late December 1970. On January 7, 1971, she was initially found eligible for 26 weeks of unemployment benefits beginning January 16, 1971, at the rate of $40.00 per week. In late March, 1971, following her periodic five week continued eligibility interview, her benefits were summarily suspended for an indefinite period. The Division gave the following reason for her suspension:

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[3]From July-September, 1971, over 82% of claimant appeals were still undecided after 75 days. U.S. Dept. of Labor, Unemployment Insurance Statistics, Table 17 at 10 (Dec., 1971). From July 1970-June 1971, over 56% of claimant appeals were undecided after 75 days. U.S. Dept. of Labor, Unemployment Insurance Statistics, Table 17a at 18 (Sept.-Oct., 1971).

[4]Between July, 1971-September, 1971, over 48% of all appealed decisions terminating eligibility were reversed by Referees. U.S. Dept. of Labor, Unemployment Insurance Statistics, Table 18 at 11 (Dec., 1971).

> Because the claimant is limiting and restricting the hours for which she is available for work, she is being held as not available for work as of week ending 3-27-71 and until such time as she enters the labor market and becomes available for all shifts of work. (Stipulation of Facts, Exhibit A).

The Division's action was based on Mrs. Burney's alleged refusal of a job offer at the Melting Pot Restaurant in Fort Wayne, Indiana. The Division admits that Mrs. Burney was not afforded a due process hearing prior to the termination of her benefits. (Defendants' Response To Request For Admissions, No. 16 at 4).

On April 2, 1971, Mrs. Burney appealed her suspension to a Referee. She contended that she was not obligated to accept the job at the Melting Pot Restaurant because she would have been required to work on the 5 p.m. to 2 a.m. shift; she did not have a car and public buses stopped running at midnight; she had never worked a night shift; she could not find a babysitter for her minor children for such late hours, and she was making an independent effort to secure work on a day shift or earlier night shift.

Faced with the total loss of unemployment compensation during the months pending the decision on her appeal, Mrs. Burney filed a motion to intervene in this action on April 27, 1971. She contended that the Division's practice of suspending unemployment

benefits without a prior evidentiary hearing violated her rights and those of her class under the "when due" and "fair hearing" requirements of the Social Security Act, 42 U.S.C. § 503(a), and the Due Process clause of the Fourteenth Amendment.

On May 7, 1971, the court below granted her motion to intervene and issued a temporary restraining order reinstating her benefits. The court found:

> . . . the continued withholding and termination of unemployment compensation insurance benefits will deprive the intervening plaintiff of the source of income necessary to meet her food, clothing and shelter needs.

On July 1, 1971, a full evidentiary hearing was held on Mrs. Burney's appeal. A Referee decision affirming her suspension was issued on July 13, 1971, some 102 days after she originally filed her request for a hearing. She subsequently appealed to the Division Review Board, and, on December 6, 1971, the Board reversed the Referee, holding that the evidence at the Referee hearing showed her benefits had erroneously been suspended. The Board found that she neither had been unavailable for work nor had turned down a suitable work offer.

On October 27, 1971, the three-judge district court held that the suspension of unemployment benefits without a *prior* evidentiary hearing violated the Social Security Act's "when due" clause. Under the

court's order, unemployment compensation recipients in Indiana are presently afforded the opportunity for an evidentiary hearing prior to the suspension of their benefits.[5]

It is well to clarify at the outset the limited scope of the questions presented herein. As the court below pointed out,[6] this case raises no issue concerning the procedural safeguards to be afforded persons whose initial claims for unemployment benefits have been rejected. The unemployed workers whose rights are here at issue have been thoroughly investigated by the Division[7] and ruled eligible for unemployment benefits for a fixed number of weeks. They have been specifically placed by the Division in a "continued claim" category. *See* Manual, §§13620, 13720-13732. This factual situation is markedly different from that of a claimant whose entitlement to benefits has never been officially established.

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[5]Indiana's suggestion that the order of the court below requires a full evidentiary hearing for every claimant every week (Jurisdictional Statement [hereinafter "J.S."] at 10), is patently absurd. Under the court's order, an evidentiary hearing is required only for claimants who have been found initially eligible and placed in a "continued claim" category, and who the Division asserts are no longer eligible for benefits.

[6]*See* J.S. at 10.

[7]*See* California Department of Human Resources Development v. Java, 402 U.S. 121, 125-28 (1971).

ARGUMENT

I.

THE SUMMARY SUSPENSION OF UNEMPLOYMENT COMPENSATION BENEFITS FOR SEVERAL MONTHS PENDING AN EVIDENTIARY HEARING VIOLATES THE "WHEN DUE" AND "FAIR HEARING" REQUIREMENTS OF THE SOCIAL SECURITY ACT.

A. Introduction

This Court, like the court below, can decide this case without reaching the constitutional question of whether the Fourteenth Amendment requires a hearing before the suspension of unemployment compensation benefits. *Cf. California Department of Human Resources Development* v. *Java*, 402 U.S. 121 (1971). Indeed, it has long been this Court's practice to first consider statutory issues, for if a statutory basis of decision can be found, delicate constitutional questions need not be reached. *See, Java, supra*, 402 U.S. at 124; *King* v. *Smith*, 392 U.S. 309, 334 (1968); *Greene* v. *McElroy*, 360 U.S. 474, 507-08 (1959); *Wong Yang Sun* v. *McGrath*, 339 U.S. 33, 48-51 (1949).

Section 303(a) of the Social Security Act, 42 U.S.C. § 503(a) provides:

> The Secretary of Labor shall make no certification for payment [of federal funds for administration of state unemployment compensation statutes] to any State unless he finds that the

law of such State, approved by the Secretary of Labor under the Federal Unemployment Tax Act, includes provisions for—

> (1) such methods of administration . . . as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due; . . .
>
> (3) opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied.

An examination of the statutory purposes of the unemployment compensation program, as revealed both in the legislative history and judicial interpretation of the Social Security Act, compels the conclusion that, under the "when due" and "fair hearing" requirements, recipients in a continued claim category must be provided with a full opportunity to be heard before the suspension of their benefits. In enacting the unemployment compensation program, Congress sought to achieve three principal purposes: (1) providing sustenance and security to unemployed workers without relegating them to public assistance; (2) helping unemployed workers to find employment substantially equivalent to their former jobs; and (3) maintaining the purchasing power of the un-

employed, thereby stabilizing consumer demand and sustaining the economy. *See generally California Department of Human Resources Development* v. *Java*, 402 U.S. 121, 130-33 (1971). To achieve its purposes, Congress must have intended a hearing procedure that insures that payments are made to workers at a time in their unemployment cycle when these goals would be facilitated rather than frustrated.[8] For this end to be accomplished, payments must not only commence promptly when a worker is unemployed, *see Java, supra*, they must also continue throughout the period of unemployment until such time as he is found after a full hearing to be no longer eligible for them.

B. The Summary Suspension of Benefits Defeats the Congressional Objectives of the Unemployment Compensation Program.

1. *The summary suspension of benefits forces eligible recipients to rely on welfare for sustaining funds.* The chief purpose of the unemployment compensation program was to "provide cash to a newly unemployed worker at a time when otherwise he would have nothing to spend, serving to maintain the recipient at subsistence levels without the necessity of his turning to welfare or private charity." *Java, supra*, 402 U.S. at 131-32; *see generally*, H. R. REP. No. 615, 74th Cong., 1st Sess. 7 (1935); S. REP. No. 628, 74th Cong., 1st Sess. 12 (1935). Thoroughly

[8]Indeed, Indiana specifically recognizes in its Jurisdictional Statement that the unemployment compensation program is designed to meet "primarily short term needs" of unemployed workers. (J.S. at 10)

familiar with the plight of workers "thrown out of work suddenly,"[9] Congress sought to alleviate the pressing need for "security during the period following unemployment." S. REP. NO. 628, *supra*. However, because of the stigma attached to relief and charity, welfare was believed to be an inappropriate means of sustaining workers during temporary periods of unemployment. As was brought out on the House Floor by the Chairman of the Ways and Means Committee:

> The advantages of social insurance over public relief are many. It does not carry with it the stigma of charity with its devastating effect on the morale of the population and its loss of self-respect. The protection afforded by social insurance comes to the worker as a matter of right. It is contingent upon the previous employment and contributions of the worker himself and does not involve the social investigation and the means test which is inevitable in any system of public relief. 79 CONG. REC. 5468 (1935) (remarks of Representative Doughton).

Congress not only viewed welfare as imposing a stigma on unemployed workers, it doubted that welfare, with its reliance upon general tax revenues which fluctuate with the state of the economy, could adequately provide large numbers of workers with sustenance during a period of economic downturn. *See Steward Machine Co.* v. *Davis*, 301 U.S. 548,

[9] *See Hearings on H.R. 4120 Before the House Comm. on Ways and Means*, 74th Cong., 1st Sess., 214 (1935) (statement of Harry L. Hopkins).

586-87 (1937); Note, *Charity versus Social Insurance in Unemployment Compensation Laws*, 73 YALE L.J. 357, 359 (1963). In order to reduce the burden on local welfare rolls during periods of economic crisis and "very materially reduce the cost of relief in future years,"[10] the Employment Security Fund was designed to accumulate reserves in times of economic prosperity. *See* H. R. REP. No. 615, 74th Cong., 1st Sess. 7 (1935).[11]

In order for unemployment compensation to provide workers "security during the period following unemployment," *Java, supra* 402 U.S. at 132, and thereby "to replace [relief] in large part," H. R. REP. No. 615, 74th Cong., 1st Sess. 7 (1935), benefit payments must continue throughout the period for which the unemployed worker has been found eligible. A substantial interruption in the payment of benefits increases the number of unemployed workers who are either left without any income whatever or are forced to turn to relief. By summarily suspending

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[10]S. REP. No. 628, 74th Cong., 1st Sess. at 12.

[11]Recent events have substantiated Congress' belief that state welfare systems cannot adequately deal with the economic dislocations caused by a severe period of unemployment. For example, in enacting emergency welfare legislation in 1971 to relieve the drain on welfare funds caused by unemployment, the California Legislature declared:

> The Legislature hereby finds that the high rate of unemployment, which has been aggravated in California's most populous regions by layoffs in the aerospace industries, has led to a high level of public assistance grants. . . . The Legislature further notes that increasing state taxes will have a depressing effect upon those individuals, firms, and industries now operating at a marginal level and will tend to further aggravate the unemployment rate and increase the welfare rolls. . . . The Legislature finds, therefore, that the most compelling state interest requires that the relationship between welfare and unemployment be recognized. Welfare Reform Act of 1971, §24.65, CAL. WELF. & INST. CODE §11252.5 (West Supp., 1971).

recipients' benefits and postponing evidentiary hearings regarding their continued eligibility for several months, the Division undermines the Congressional purpose of "maintain[ing] the recipient at subsistence levels without the necessity of his turning to welfare or private charity." *Java, supra*, 402 U.S. at 131-32.

2. *The summary suspension of benefits renders eligible workers less able to find substantially equivalent employment.* Unemployment insurance was established by Congress "as a means of assisting a worker to find substantially equivalent employment." *Java, supra*, 402 U.S. at 132. In explaining to the House Ways and Means Committee why the draftsmen of the Social Security Act chose to pay unemployment benefits, a member of the President's Committee on Economic Security pointed out:

> This [the Act] covers a great many thousands of people who are thrown out of work suddenly. It is essential that they be permitted to look for a job. They should not be doing anything else but looking for a job. We felt that in that period of 2½ to 3 months the beneficiaries should get an insurance benefit in cash. *Hearings on H.R. 4120 Before the House Committee on Ways and Means*, 74th Cong., 1st Sess. 214 (1935) (statement by Harry L. Hopkins, Federal Emergency Relief Administrator).

If labor is able to flow from pockets of unemployment to areas where jobs are available, employment

becomes more stabilized and the supply and demand mechanism in the labor market operates more efficiently. But the ability of a worker to find substantially equivalent employment is severely undercut when funds which may be used to purchase transportation for job interviews are terminated for several months during the period in which he is unemployed. The funds that might have been used to increase labor mobility may instead have to be spent on basic necessities. *Cf. Goldberg* v. *Kelly*, 397 U.S. 254, 264 (1970). Thus, to the extent that payments are delayed, the opportunity to find employment is diminished, which in turn often lengthens the period in which a recipient must rely on unemployment benefits for support. By summarily suspending payments pending an evidentiary hearing, only to reinstate them many months later, the Division is often responsible for a greater withdrawal from the Employment Security Fund than if payments were made in their regular course during the initial stages of unemployment.

3. *The summary suspension of benefits reduces the purchasing power of the unemployed.* Both the national economy and the unemployed worker benefit when purchasing power is maintained throughout periods of high unemployment. Congress viewed unemployment compensation as "a measure intending to maintain purchasing power, upon which business and industry are dependent." H. R. REP. No. 615,

74th Cong., 1st Sess. 7 (1935); *see generally, Java, supra*, 402 U.S. at 132-33. During the period in which they receive no compensation, unemployed workers are to a great extent inhibited from spending money on consumer goods. Declining consumption leads to a decrease in production by business firms, which in turn causes further unemployment, and eventually, economic depression. On the other hand, maintenance of purchasing power, through a steady flow of unemployment benefits commencing soon after unemployment occurs, contributes to the stability of the overall economic situation. As Senator Wagner, sponsor of the Social Security Act, pointed out to the Senate Committee on Finance:

> The chief merit of unemployment insurance, however, is that it will exert a profound influence upon the stabilization of industry. . . . The transfer of purchasing power by benefit payments when danger threatens will float the business ship off the shoals of depression to the security of prosperity. *Hearings on S. 1130 Before the Senate Committee on Finance*, 74th Cong., 1st Sess. 2 (1935).[13]

[13]Similarly, Frances Perkins, Secretary of Labor and Chairman of the President's Committee on Economic Security, which drafted the Social Security Act, testified:

> We have also by observation of the condition of other countries having a modest scheme of unemployment insurance, come to a recognition that the small merchants of a locality, and those who provided them with their stock, had derived a benefit because persons out of work continued to buy the necessities of life and therefore helped to make a market for the whole community. That, of course, in its own turn, has a very definite and advantageous effect upon employment in other lines than in that first depressed. *Hearings on S. 1130 Before the Sen. Comm. on Finance*, 74th Cong., 1st Sess., 111 (1935).

Thirty-five years later, in reporting the Federal-State Extended Unemployment Compensation Act of 1970 (Public Law 91-373), the Senate Committee on Finance reiterated the vital role of unemployment benefits in maintaining economic stability:

> In periods of economic recession, when substantial numbers of workers in a State or in the Nation experience unemployment which extends beyond the periods for which they are protected under current State laws, the resulting uncompensated unemployment may have a serious impact not only upon the workers and their families, but on the purchasing power and economic health of the entire Nation. S. REP. NO. 91-752, 91st Cong., 2nd Sess. (1970), U.S. CODE CONG. AND AD. NEWS at 3635.

For the maintenance of purchasing power to be achieved, it is necessary that unemployment benefits be paid throughout the critical period of unemployment—not in lump sum form, long after unemployment has ceased. Payments must *regularly* be made "early in the downturn, immediately after unemployment makes its appearance." *See* Clague, *The Economics of Unemployment Compensation*, 55 YALE L.J. 53, 69 (1945). Uninterrupted payments enable workers and their families

> to preserve existing assets, such as homes, furniture, and automobiles, thus avoiding the forced liquidation of assets which aggravates the downturn in business. They encourage more

> confident spending of other resources, thus helping to avoid a "freezing" of purchasing power on the part of millions of workers when they are faced with unemployment. Clague, *supra*, 55 YALE L.J. at 69.[13]

Whereas lump sum payments may be spent erratically, a steady weekly income assures that "these funds are ordinarily spent for the basic necessities of life and furnish purchasing power for the products of our basic industries such as agriculture, food, and clothing." *Id.*

By interrupting the steady stream of benefit payments to unemployed workers for several months, the summary suspension of unemployment compensation frustrates the Social Security Act's objective of stabilizing the economy by maintaining the purchasing power of the unemployed. *Cf. Java, supra*, 402 U.S. at 132-33.

C. By Suspending Unemployment Benefits for Several Months Pending a Hearing on Continued Eligibility, the Division Fails to Insure the Full Payment of Unemployment Compensation "When Due."

Section 303(a)(1) of the Social Security Act provides that state unemployment compensation programs must "be reasonably calculated to insure full payment of unemployment compensation when due." 42 U.S.C. § 503(a)(1). In *California Department of*

[13]Unemployment compensation is "specially earmarked for the use of the unemployed at the very times when it is best for business that [it] should be so used." Statement of Senator Robert F. Wagner, *Hearings on S. 1130 Before the Sen. Comm. on Finance*, 74th Cong., 1st Sess., 2 (1935).

Human Resources Development v. *Java*, 402 U.S. 121, 133 (1971), this Court found that under this provision of the Act, unemployment benefits become "due" after the *initial* eligibility determination—"the critical point in the [unemployment compensation] procedure." 402 U.S. at 127. Based upon this finding, the Court held unlawful the summary suspension of an unemployed worker's benefits pending an employer's appeal. Since the summary suspension of benefits frustrated the Congressional objective of providing "early substitute compensation during unemployment," the Court held that it violated the Social Security Act's "when due" requirement. 402 U.S. at 133.

The continued claim recipients in this case, like the recipients in *Java*, have been found initially eligible for benefits for a fixed number of weeks, yet they receive no benefits pending a Referee's hearing on their continued eligibility. If found to be still eligible (as almost 50% are),[14] their benefits will be paid to them retroactively in a lump sum many months later, when they may no longer be unemployed. Indeed, in 1971 the average length of time an unemployed worker in Indiana received unemployment benefits was eleven weeks. THIRTY-SIXTH ANNUAL REPORT OF THE INDIANA EMPLOYMENT SECURITY BOARD, EMPLOYMENT SECURITY IN INDIANA 1971 at 55 (March 30, 1972) (hereinafter "*Annual Report*").

[14] *See* n. 4, *supra*.

Since over 82% of appealed suspensions were not decided within eleven weeks (75 days),[15] the overwhelming majority of suspended recipients received benefits at a time when they no longer qualified for *current* payments. Thus, in the event his benefits are summarily suspended, an *eligible* worker may receive no weekly benefits when he is unemployed and in desperate need of income,[16] only to receive a lump sum payment when he is already back at work.

The Division concedes that unemployment benefits are designed to meet "primarily short-term needs." (J.S. at 10). However, the Division's own statistics reveal that the Indiana scheme does not result in making payments during the "limited period" between jobs which Congress intended unemployment benefits to cover. H.R. REP. No. 615, 74th Cong., 1st Sess. at 7 (1935); REPORT TO THE PRESIDENT OF THE COMMITTEE ON ECONOMIC SECURITY, *Hearings on S. 1130 Before the Senate Committee on Finance*, 74th Cong., 1st Sess. at 1321-22 (1935).[17] Since the suspension of benefits pending an evidentiary hearing *systematically* denies "early substitute compensation during unemployment" to eligible unemployed workers, it frustrates the fundamental objectives of the Social Security Act, and, as the court below found, is

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[15] See n. 3, *supra*.

[16] See pp. 30-39, *infra*.

[17] As a California legislative study pointed out:

> It has always been conceded that the purpose of an unemployment insurance program is to provide benefits when unemployed and not four or five weeks thereafter. REPORT OF THE SENATE INTERIM COMMITTEE ON UNEMPLOYMENT INSURANCE TO THE FIFTY-SIXTH CALIFORNIA LEGISLATURE, 62 (1945).

not "reasonably calculated to insure full payment of unemployment compensation when due." 42 U.S.C. §503(a)(1).

Faced with an identical summary suspension procedure but a much shorter period of delay pending the Referee decision, a three-judge district court in *Wheeler* v. *Vermont*, 335 F. Supp. 856 (D. Vt., 1971), reached the same conclusion as the court below and held that the procedure violated the Social Security Act. As Judge Oakes stated:

> We thus face the question whether this procedure falls without the federal statutory mandate of §303(a)(1) of the Social Security Act, 42 U.S.C. § 503(a)(1), that the state method of administration be "reasonably calculated to insure full payment of unemployment compensation when due." *See California Department of Human Resources* v. *Java, supra; cf. Rosado* v. *Wyman*, 397 U.S. 397, 420-21 (1970), *aff'd after remand*, 402 U.S. 991 (1971); *King* v. *Smith*, *supra* at 317, 333. The evidence here shows that on the average it takes approximately 37.5 days from a time a claimant appeals from a Claim Examiner's determination until the Appeal Referee's decision is rendered. This delay alone would be enough to warrant a finding that the procedure as we have above described it is not "reasonably calculated" to produce full payment "when due." 335 F. Supp. at 861. *Contra Torres* v. *New York State Dept. of Labor*, 321 F. Supp. 432 (S.D.N.Y. 1971)

(three-judge court), *vacated*, 402 U.S. 968, *judgment reinstated*, 333 F. Supp. 341, *aff'd*, ... U.S. .... (1972), 40 U.S.L.W. 3415.

The Division urges that benefits are only "due" each week since each week constitutes a "new" eligibility determination. Both the Division's terminology and its practice belie this contention. After an employed worker has been found eligible for a fixed number of weeks following an exhaustive initial eligibility investigation, *see Java, supra*, 402 U.S. at 125-128, he is placed by the Division in a "continued claim" category. Manual §§ 13720-13732. Thereafter, he ordinarily is personally interviewed to check whether he has maintained his continued eligibility, not every week, but only at *five* or *ten* week intervals, depending on his category.[18]

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[18]Section 13720 of the Manual provides that continued claim recipients be placed in one of three categories:

Group A: Those claimants who have shown [in their initial eligibility investigation] a firm attachment to the labor market;

Group B: Those claimants [who] . . . need further clarification or who . . . are classified temporarily until placed in the A or C groups;

Group C: Those claimants who do not show a firm attachment to the labor market and who present problems of reemployment.

Unemployed workers placed in Group A are defined as:

Those claimants [who] . . . have had employment with one employer or have been in a regular occupation for a long enough period of time to indicate that they want to obtain suitable work as soon as it can be found. Manual §13723.

Group A workers are interviewed only once every *ten* weeks in a "special interview" whose purpose "is to determine whether or not the claimant shall continue in Group A." Manual § 13725.

Group C workers are defined as: "Those claimants [for whom] . . . there are likely to be continuing questions of ability to work or availability. . . ." Even Group C workers (those who are deemed likely to present questions concerning the maintenance of their continued eligibility) ordinarily are informally interviewed only once every *five* weeks. Manual §13727.

In addition to reporting for interviews every five or ten weeks, the recipient must come in to the Employment Security Office each week to fill out a voucher for his weekly check. In signing the voucher, he certifies whether he "work[ed] anywhere last week [and] if so, what were [his] earnings?" and whether he "refuse[d] an offer of work?" The Manual points out that in "accepting the voucher" "it is unnecessary [for the clerk] to question the claimant in detail . . . with respect to each certification." Manual § 13620.

If his continued eligibility is questioned, his benefits are suspended not only for one week, but for many weeks and often for an indefinite period.[19]

As the court below properly found, benefits are continuously "due" continued claim recipients throughout their fixed period of eligibility:

> . . . the court finds that the concept of when benefits are due under the Social Security Act does not change from week to week after a claimant has been found eligible and no prior, due process hearing has been held with regard to a subsequent finding of eligibility. . . . The court thus finds that plaintiff Burney's benefits were "due" and could not be summarily suspended due to a deputy's determination of ineligibility under §2-1542a(d). Having been found eligible pursuant to the [initial eligibility determination procedure], plaintiff Burney was entitled to benefits until defendants afforded her a hearing. To conclude otherwise would frustrate the purpose of early substitute compensation during unemployment under § 303 (a) (1) of the Social Security Act. *See Java, supra*, 402 U.S. at 133-35. (J.S., Appendix A at 9-10).

D. By Delaying a Hearing Until Several Months After the Suspension of Benefits, the Division Violates the "Fair Hearing" Requirement of the Social Security Act.

The Social Security Act requires that the Division

[19] *See* IND. ANN. STAT. §52-1540 (Burns 1964 Repl.) (permanent termination for alleged misstatement); IND. ANN. STAT. §52-1538b (Burns 1964 Repl., 1971 Supp.) (indefinite suspension for alleged continuing unavailability for work); IND. ANN. STAT. § 52-1539a (Burns 1964 Repl., 1971 Supp.) (suspension for alleged refusal of suitable work: (a) for benefit periods established before July 3, 1971—until claimant earns not less than ten times his weekly benefit amount, and thereafter, a 25% reduction in benefits; (b) for benefit periods established subsequent to July 3, 1971—for five consecutive calendar weeks or until claimant earns at least six times his weekly benefit amount, and thereafter, a 25% reduction in benefits).

afford a "fair hearing" to unemployment compensation recipients whose benefits it seeks to suspend. 42 U.S.C. §503(a)(3). While the elements of a "fair hearing" are not specified within the Act itself, the hearing must be held "at a meaningful time and in a meaningful manner." *Cf. Boddie* v. *Connecticut*, 401 U.S. 371 (1971); *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965).[10]

With regard to continued eligibility for unemployment compensation, only a hearing held *before* benefits are suspended meets the Act's "fair hearing" requirement, for only a prior hearing insures the regular flow of benefits to eligible workers—which "is what the Unemployment Insurance Program is all about." *Java, supra*, 402 U.S. at 135.

The Division urges that the post-termination Referee hearing fulfills its "fair hearing" obligation under the Act. (J.S. at 10).[11] However, by delaying

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[10]The "manifest purpose" of the statutory command that a "fair hearing" be held is to afford aggrieved parties procedural protections which are least equivalent to those required by due process. Shields v. Utah-Idaho Central Ry. Co., 305 U.S. 177, 182 (1938); *see also* Philadelphia Co. v. Securities and Exchange Commission, 197 F.2d 808, 817 (D.C. Cir. 1949), *vacated as moot*, 337 U.S. 901 (1949).

[11]In so doing the Division evidently recognizes that its five week "periodic interview" and ten week "special interview" cannot be considered "fair hearings" within the meaning of the Act. As the United States Department of Labor has stated:

> Hearings must be fair, and they must therefore be conducted in accordance with procedural safeguards. The essential requisites of fairness, although expressed in many ways, include the following elements which have been excerpted from case law: "timely notice to all claimants of every material step in the proceedings; . . . to hear the evidence against him and to know the claims of his opponent; . . . to cross-examine witnesses; . . . that the Decision of the Board shall be governed by and based upon the evidence produced at the hearing . . . ." U.S. Department of Labor Unemployment Insurance Services Office of State Operations, GUIDE TO UNEMPLOYMENT INSURANCE BENEFITS APPEALS: PRINCIPLES AND PROCEDURES 2-3 (1970).

The Division's informal interviews do not provide these safeguards.

this hearing until several months after the suspension of a continued claim recipient's benefits, the Division fails to provide a hearing at a meaningful stage in the unemployment compensation cycle. Large numbers of eligible recipients are thereby deprived of "early substitute compensation during unemployment." *Java, supra,* 402 U.S. at 133. The Division's failure to provide a pre-termination hearing directly contravenes the Congressional purposes of (1) providing sustenance and security to unemployed workers without relegating them to welfare; (2) helping workers in their search for new employment; and (3) maintaining the purchasing power of the unemployed through the continuous payment of benefits, and thus violates the fair hearing requirement of the Social Security Act. 42 USC 503(a)(3).

II.

THE SUMMARY TERMINATION OF UNEMPLOYMENT BENEFITS FOR SEVERAL MONTHS PENDING A REFEREE HEARING VIOLATES DUE PROCESS SINCE THE SEVERE ECONOMIC HARDSHIP IMPOSED ON ELIGIBLE RECIPIENTS OUTWEIGHS THE GOVERNMENTAL INTEREST IN SUMMARY ADJUDICATION.

A. Due Process Requires an Evidentiary Hearing Prior to the Termination of Unemployment Benefits.

The framework for considering the requirements of procedural due process[23] was set forth by this Court

[23]It is beyond dispute that procedural due process is applicable to the Division's actions in terminating unemployed benefits. As this Court held in Sherbert v. Verner, 374 U.S. 398 (1963) and specifically reaffirmed in Goldberg v. Kelly, 397 U.S. 254, 262 (1970): "Relevant constitutional restraints apply . . . to disqualification for unemployment compensation."

in *Goldberg* v. *Kelly*, 397 U.S. 254, 262-63 (1970), a case that dealt with welfare terminations but otherwise is identical to the case *sub judice:*

> The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be "condemned to suffer grievous loss," and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication [citation omitted].

After weighing the interests of the recipients and the State, this Court held in *Goldberg, supra,* and its companion case, *Wheeler* v. *Montgomery,* 397 U.S. 280 (1970), that procedural due process requires an evidentiary hearing *before* welfare payments may be discontinued or suspended. This Court further ruled that the pre-termination hearing must contain the fundamental elements of "rudimentary due process," including timely and adequate notice detailing the reasons for a proposed termination, the right to appear personally and through counsel, an opportunity to present evidence and confront and cross-examine adverse witnesses, and the right to a decision by an impartial decision-maker based solely on the rules and evidence adduced at the hearing. *Goldberg* v. *Kelly, supra,* 397 U.S. at 267-71.

The language of the *Goldberg* opinion indicates that a prior hearing is also required before unemployment benefits may be terminated. In holding that

welfare benefits may not be terminated without a prior hearing, this Court specifically cited a case dealing with unemployment compensation terminations—*Nash v. Florida Industrial Commission*, 389 U.S. 235 (1967)—for the proposition that the loss of governmental benefits such as welfare may cause severe personal deprivation.[23] Thus, in distinguishing the termination of welfare benefits on the basis of need from the termination of such other government entitlements as contracts, employment, and tax exemptions, 397 U.S. at 264, the Court in *Goldberg* recognized that similar need is present in the termination of unemployment benefits.

The Division urges that *Goldberg* is inapplicable because of an alleged distinction between the "weekly" eligibility of unemployment compensation recipients and the "continued eligibility" of welfare recipients. (J.S. at 10). To support this distinction, it contends that, unlike unemployment compensation recipients, welfare recipients are not required "to carry out any specified activities on a regular basis." (J.S. at 10). As demonstrated below, no such distinction may properly be drawn.

The procedure for awarding continuing unemployment benefits does not differ significantly from that used with respect to welfare. In both programs, re-

[23]This Court stated in *Goldberg:* "For qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical care. *Cf.* Nash v. Florida Industrial Commission, 389 U.S. 235, 239 (1967)." 397 U.S. at 264.

cipients begin receiving regular benefits after an initial eligibility investigation, and thereafter are required to make periodic reports concerning their continued eligibility. An unemployment compensation recipient who has been found initially eligible for benefits is placed by the Division in a "continued claim" category and must report for an "interview" to review his status only once every five or ten weeks. Manual §§13725, 13727.[14] Welfare recipients likewise undergo periodic eligibility reviews, and are further responsible for immediately notifying the County Welfare Department of any change of circumstances which may affect continued eligibility, including changes in living arrangements, income, property, composition of the household, or the school status of their children. Indiana Public Assistance Manual, Chapter XI-A-1 & 2. Should questions arise concerning their continued eligibility, both unemployment compensation and welfare recipients are liable to have their benefits suspended indefinitely.[15]

Both welfare and unemployment compensation recipients must perform regular duties to maintain their continued eligibility. Unemployment compensation recipients must, for example, seek work, be available for work and report any change in status or income. IND. ANN. STAT. §52-1538b (Burns 1964 Repl., 1971

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[14]To receive his check, an unemployment compensation recipient must also turn in a weekly payment voucher. Manual §§13600, 13610, 13620. In some instances the voucher can be "executed" by mail. Manual §13628.

[15]*See* n. 19, *supra*.

Supp.); §52-1540 (Burns 1964 Repl.). Welfare recipients similarly may be required to accept employment, undergo job training (IND. ANN. STAT. §52-1241a (Burns 1964 Repl., 1971 Supp.); 4 IND. ADMIN. RULES & REGS. § (52-1244)-2 (Burns 1967, 1971 Supp.)), seek other sources of income (*see, e.g.*, Indiana Public Assistance Manual, Chapter III-C-15, Chapter IV-B-21), and report any changes in status or income. (Indiana Public Assistance Manual, Chapter XI-A-1 & 2).

The identical distinction between welfare and unemployment benefits urged by the Division in this case was soundly rejected in *Crow* v. *California Department of Human Resources Development*, 325 F. Supp. 1314, 1319 (N.D. Cal. 1970). Holding that, under *Goldberg* v. *Kelly*, *supra*, unemployment benefits may not be terminated without a prior evidentiary hearing,[28] the court stated:

> Welfare and unemployment compensation schemes both involve an initial decision *re* eligibility, followed by periodic determinations

[28] *Accord* Wheeler v. Vermont, 335 F. Supp. 856 (D. Vt. 1970) (three-judge court); Java v. California Department of Human Resources Development, 317 F. Supp. 825 (N.D. Cal. 1970) (three-judge court), *aff'd on statutory grounds*, 402 U.S. 121 (1971); Torres v. New York State Department of Labor, 321 F. Supp. 432, 438 (S.D.N.Y. 1971) (three-judge court) (Lasker, J.) (dissenting opinion). *Contra* Torres v. New York State Dept. of Labor, 321 F. Supp. 432 (S.D.N.Y. 1971) (three-judge court), *vacated*, 402 U.S. 968, *judgment reinstated*, 333 F. Supp. 341, aff'd, ... U.S. ..... (1972), 40 U.S.L.W. 3415.

Prior due process hearings have also been required in other areas closely related to the termination of welfare and unemployment benefits. *See e.g.*, Escalera v. New York City Housing Authority, 425 F. 2d 853 (2nd Cir.), *cert. denied*, 400 U.S. 853 (1970) and Caulder v. Durham Housing Authority, 433 F. 2d 998 (4th Cir. 1970), *cert. denied*, 401 U.S. 1003 (1971) (evictions from public housing); Davis v. Caldwell, 53 F.R.D. 373 (N.D. Ga. 1971) (three-judge court) (termination of workmen's compensation benefits).

> that the applicant's circumstances have not changed in such a way as to affect that first decision.[17]

Far from being confined to welfare, the principles enunciated in *Goldberg* v. *Kelly*, *supra*, are supported by a host of recent decisions of this Court, which firmly establish that a prior due process hearing is required *before* the imposition of serious personal loss. In *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969), the harm caused a wage earner by the partial loss of his paycheck was held sufficient to require a due process hearing prior to the garnishment of wages.[18] In *Wisconsin* v. *Constantineau*, 400 U.S. 433, 437 (1971), where the "posting" of an individual as an excessive drinker damaged his reputation and integrity, this Court stated:

> . . . the right to be heard before being condemned to suffer grevious loss *of any kind*, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society [citation omitted, emphasis added].

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[17]Surely the result in *Goldberg* would not have been different if the welfare department involved therein had employed identical procedures, but simply had used a different terminology labelling its periodic review of eligibility a "new eligibility determination." As this Court stated in Bell v. Burson, 402 U.S. 535, 541 (1971), "in reviewing state action in this area [of procedural due process] . . . we look to substance, not to form, to determine whether constitutional minimums have been honored."

[18]Lower courts have applied the *Sniadach* rationale to a variety of related situations. *See, e.g.*, Larson v. Fetherston, 172 N.W. 2d 20 (Wisc. Sup. Ct. 1969) and Randone v. Appellate Department, 5 Cal. 3d 536, 96 Cal. Rptr. 709 (1971) (funds deposited in a bank may not be attached without a prior hearing); Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970) and Santiago v. McElroy, 319 F. Supp. 284 (E.D. Pa. 1970) (innkeeper's lien laws held unconstitutional for failure to provide a prior hearing).

In *Bell* v. *Burson*, 402 U.S. 535, 542 (1971), a unanimous Court held that the termination of a driver's license, which frequently is a prerequisite for a worker's transportation to his job, necessitates a prior hearing, since:

> it is fundamental that except in emergency situations (and this is not one) due process requires that when a state seeks to terminate an interest such as that here involved, it must afford notice and an opportunity for hearing appropriate to the nature of the case *before* the termination becomes effective [footnote and citation omitted].

As the court stated in *Crow* v. *California Department of Human Resources Development*, 325 F. Supp. 1314, 1318 (N.D. Cal. 1970), "it is clear that a predetermination hearing . . . *is the constitutional norm, and not the exception*, . . ."[19]

B. The Summary Termination of Unemployment Benefits Imposes Severe Economic Hardship on Eligible Recipients.

At the very inception of the unemployment compensation program, this Court emphasized the singular importance of unemployment benefits in staving off the "evils of the attendant social and economic wastage" caused by unemployment. *Carmichael*

[19] *See also* Armstrong v. Manzo, 380 U.S. 545 (1965); Opp Cotton Mills v. Administrator, 312 U.S. 126 (1941); Ohio Bell Telephone Company v. Public Utilities Commission, 301 U.S. 292 (1937); Southern Railway Co. v. Virginia, 290 U.S. 190, 196 (1933); Coe v. Armour Fertilizer Works, 237 U.S. 413 (1915); Security Trust Company v. Lexington, 203 U.S. 323 (1906); Hovey v. Elliot, 167 U.S. 409 (1897); Windsor v. McVeigh, 93 U.S. 274 (1876).

v. *Southern Coal and Coke Co.*, 301 U.S. 495, 516 (1937). Thirty years later in *Nash* v. *Florida Industrial Commission*, 389 U.S. 235 (1967), a unanimous Court pointed out that the improper termination of unemployment benefits for a substantial period would cause an unemployed worker to "risk financial ruin." 389 U.S. at 239. In the words of Mr. Justice Black:

> Even the hope of a future award of back pay may mean little to a man of modest means and heavy responsibilities faced with the immediate severance of sustaining funds. *Id.*

As recently as last term, this Court reiterated the "obvious" importance of unemployment compensation to the newly unemployed worker, since it provides cash "at a time when otherwise he would have nothing to spend." *California Department of Human Resources Development* v. *Java*, *supra*, 402 U.S. at 125, 132.

The unemployment compensation system is part of the 1935 Social Security Act's comprehensive scheme of providing for the general welfare of all Americans during a period when they might otherwise be subject to severe economic deprivation. *See Helvering* v. *Davis*, 301 U.S. 619, 641-45 (1937); *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 586-87 (1937). Unemployment benefits serve to maintain involuntarily unemployed workers and their families

at a time when they have lost their source of income. Although providing greater dignity and security, they were intended to be complementary in nature and design to the Social Security Act's welfare programs for sustaining the blind, disabled, young and aged. *See Java, supra; King* v. *Smith*, 392 U.S. 309, 327-33 (1968).

Thus, while the unemployment compensation system is financed under insurance principles, "the insurance technique is a means to the welfare end." Becker, *The Inadequacy of Benefits in Unemployment Insurance*, IN AID OF THE UNEMPLOYED 80 (1965). A detailed inquiry into individual necessities in every case is not required, since need is based on class studies and "operates in terms of averages." *Id.*[30] But the *raison d'etre* of the system is to meet individual needs:

> It is sometimes said that unemployment insurance is not based on need. Stated thus, without qualification, the proposition contains a grave error. . . . If in 1935 we had not judged that there existed a need which individuals were incapable of meeting themselves, unemployment insurance would not have been established. *Id.* at 81.[31]

[30]Because of the greater needs of low-income workers, unemployment benefit formulae are weighted in their favor: "The higher paid worker receiv[es] a smaller portion of his wages in benefits . . . [because] he is not in so great need as the lower-paid worker and is more able to help himself." *See* Becker, *The Inadequacy of Benefits in Unemployment Insurance*, IN AID OF THE UNEMPLOYED 81 (1965). Moreover, "a judgment as to need underlies the provision of uniform duration, minimum benefits, and—in twelve states—dependency allowances." *Id.*

[31]*See* Java *supra*, 402 U.S. at 130.

In holding that unemployment benefits may not be terminated or suspended in Vermont without a prior hearing, a three-judge district court pointed out:

> The fact that unemployment benefits are paid without reference to need, that is to say, without reference to a means test, does not mean that a given claimant's need is qualitatively different from that of a welfare recipient. While such need may from time to time not be, in *Goldberg's* turn of phrase, "brutal," speaking quantitatively, it is nonetheless compelling in the constitutional sense; the payment of unemployment benefits to those entitled to them permits retention of the basic human dignity that past accomplishment alone merits, avoiding in Macauley's stark phrase, sinking, after many vicissitudes of fortune, into "abject and hopeless poverty" [citation omitted]. *Wheeler* v. *Vermont*, 335 F. Supp. 856, 861-62 (D. Vt. 1971).

Empirical data confirms the vital role of unemployment benefits. For the average unemployment compensation recipient, unemployment imposes severe financial hardships, even with the uninterrupted payment of benefits. The median liquid assets available to a typical worker's family[11] to meet an emergency which cuts off the flow of income is only $260.00. Katoma, et. al., SURVEY OF CONSUMER FINANCES,

[11]There are 39,303,000 families in the United States and 9,136,000 unrelated individuals. The average family has 3.54 members. U.S. Bureau of the Census, STATISTICAL ABSTRACT OF THE UNITED STATES, Table 40 at 35 (1970).

Table 6-3 at 100 (1970). But unemployment is especially likely to fall upon workers without any liquid assets.[33] Fifty-three percent of all unemployed workers in Indiana who are found eligible for unemployment benefits file more than one claim per benefit year. INDIANA EMPLOYMENT SECURITY DIVISION, SOME SIGNIFICANT STATISTICS ABOUT UNEMPLOYMENT INSURANCE IN INDIANA, Table 8 at 7 (March 1972) (hereinafter "*Significant Statistics*"). Employees who experience more than one unemployment episode per year are usually unable to build up cash reserves for periods of sudden unemployment. Since an unemployed worker must usually wait at least three weeks before unemployment benefits initially commence (*see* Manual §13130; *Java*, *supra*, 402 U.S. at 126), by the time payments begin, all of his savings will ordinarily have been exhausted.

Once payments do begin, the amount of money a recipient receives constitutes only a fraction of his former salary.[34] In order to adjust to the acute curtailment of family income, basic necessities often have to be sacrificed. According to one survey, twenty-six percent of households receiving unemploy-

[33]Even when employed, the average unemployed compensation claimant is hardly able to keep above the poverty line. In California, for example, the median annual earnings of unemployment compensation claimants was $3,933. California Department of Human Resources Development, Claimants Who Filed Valid New Claims October 1966-September 1967, Report No. 416, No. 6 at 3 (April 1, 1970); in New York, more than 40% of unemployment compensation claimants earned less than $3000, and more than 70% earned less than $5000 in 1967. New York State Department of Labor, Unemployment Insurance Beneficiaries (March 1970).

[34]In 1971, unemployment benefits in Indiana constituted less than 28% of the average wages of workers covered by the unemployment compensation program. *Significant Statistics*, *supra*, Table 6 at 6.

ment benefits must resort to reductions in food expenditures, usually in the first week of unemployment. P. KLEIN, FINANCIAL ADJUSTMENTS TO UNEMPLOYMENT 35, 40 (1965). Many recipients are forced to default on fixed obligations.[35] In over one-quarter of the households receiving unemployment compensation, the family is forced to go into debt during the year of unemployment. *See* P. KLEIN, *supra*, at 3. The percentage would be expected to be even higher among the recipients presently before this Court who, although found eligible for benefits for a fixed duration, receive *no* funds for many months pending a due process hearing. For these unemployed workers, the loss of unemployment benefits may be devastating. A study based on over five million unemployment compensation recipients points out that "the combination of all other types of non-wage income contributed less to the aggregate income of the unemployed than did unemployment insurance." Stein, *Special Labor Force Report: Work History, Attitudes & Income of the Unemployed*, 86 MONTHLY LAB. REV. 1405, 1411 (1963).

For the unemployment compensation recipient whose benefits are summarily terminated, welfare or

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[35] *See* Note, *The Relationship of Unemployment to Mortgage Foreclosure*, 86 MONTHLY LAB. REV. 1421, 1422 (1963). Approximately 30% of all unemployment compensation claimants become delinquent in payments on new appliances, and 14% become delinquent in rent payments. *See* P. KLEIN, FINANCIAL ADJUSTMENTS TO UNEMPLOYMENT 31 (1965).

charity is either unavailable or poses a cruel[36] and inadequate substitute for unemployment benefits. There are four categorical public assistance programs created by the Social Security Act and administered by the states: Blind Assistance, IND. ANN. STAT. §§52-1221 — 52-1239b (Burns 1964 Repl., 1971 Supp.); Disability Assistance, IND. ANN. STAT. §§52-1251a—52-1251v (Burns 1964 Repl., 1971 Supp.); Old Age Assistance, IND. ANN. STAT. §§52-1201 — 52-1220 (Burns 1964 Repl., 1971 Supp.); and Aid to Families with Dependent Children, IND. ANN. STAT. §§52-1240—52-1251 (Burns 1964 Repl., 1971 Supp.). Since an unemployment compensation recipient would have to be blind, disabled, or of retirement age to qualify for the first three categories, these would generally not be available to him, as he, by definition, must be eligible for the labor market. IND. ANN. STAT. §§52-1538a—52-1538b (Burns 1964 Repl., 1971 Supp.). In order to qualify for the fourth category (AFDC), the recipient must be the head of a family with only one able-bodied parent, a requirement which excludes all unmarried workers without children and the overwhelming proportion of married workers.[37]

[36] As Congress recognized in instituting a national unemployment compensation program, the worker who looks upon receiving welfare as a source of embarassment may lose his dignity and self-respect by being forced to apply for welfare assistance. *See* P. DOUGLAS, STANDARDS OF UNEMPLOYMENT INSURANCE 20 (1933). One of the chief purposes of the unemployment compensation program was to provide income for an unemployed worker *"without the necessity of his turning to welfare or private charity."* Java, *supra*, 402 U.S. at 131 (emphasis added).

[37] Unlike many other states, Indiana does not provide AFDC assistance for children of an unemployed father. The AFDC program for dependent children of unemployed fathers (AFDC-U) was established by §407 of the Social Security Act (42 U.S.C. §607), with participation by the states made optional. Indiana has chosen not to participate in the program.

Furthermore, to receive AFDC assistance a family must have less than $700 in resources. Indiana Public Assistance Manual, Chapter IV-B-10.

Nor are local emergency relief programs a feasible alternative in Indiana. Unlike many states, Indiana does not have a county-operated general assistance program. Emergency relief is a wholly local program administered by township trustees without any state standards. *See generally* IND. ANN. STAT. §§52-139—52-199 (Burns 1964 Repl., 1971 Supp.). Over 1000 township programs exist in the State.[11] Since emergency relief is funded by local resources,[12] it is completely inadequate to provide even a bare subsistence level of benefits.

Thus, an unemployed wage earner in Indiana whose benefits have been summarily terminated is virtually excluded from the four categorical public assistance programs and would suffer financial ruin if forced to rely on local emergency relief. *Compare Torres* v. *New York State Dept. of Labor, supra.* And, even if eligible for AFDC, he would first be required to undergo an eligibility investigation by the local welfare agency which may not be completed for a number of weeks.[13]

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[11]For a listing of the townships, *see* IND. ANN. STAT. §§65-211, 65-220 (Burns 1961 Repl.).

[12]*See* Horowitz and Neitring, *Equal Protection Aspects of Inequalities in Public Education and Public Assistance Programs From Place to Place Within a State*, 15 U.C.L.A. L. REV. 787, 813 (1968).

[13]In Indiana the determination of AFDC eligibility need not be completed for 30 days. Indiana Public Assistance Manual, Chaper VII-A-1.

The wrongful termination of unemployment benefits for many months may, therefore, cause economic catastrophe. As the court below noted in granting Mrs. Burney a temporary restraining order: "the continued withholding and termination of unemployment compensation benefits will deprive [her] of the source of income necessary to meet her food, clothing and shelter needs." In this case, as in *Goldberg* v. *Kelly*, *supra*, 397 U.S. at 264:

> The termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits.[41]

The unemployment compensation recipient whose benefits are summarily terminated is in far more desperate straits than the wage earner whose paycheck was garnished in *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969). Under the Wisconsin pre-judgment garnishment statute declared unconstitutional in *Sniadach*, a worker still received from his paycheck a statutory "subsistence allowance" of $25.00 to $40.00 per pay period. 395 U.S. at 338 n.1. For the unemployment compensation recipient, the entire "subsistence allowance" is terminated, and nothing whatever is paid pending the hearing in his

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[41] As this Court found in *Java*, *supra*, 402 U.S. at 131-32:
Unemployment benefits provide cash to a newly unemployed worker "at a time when otherwise he would have nothing to spend," serving to maintain the recipient at subsistence levels without the necessity of his turning to welfare or private charity. *See also* concurring opinion of Mr. Justice Douglas, 402 U.S. at 136.

case. Even more than pre-judgment garnishment, summary termination of unemployment benefits "may as a practical matter drive a wage-earning family to the wall." *Cf. Sniadach, supra,* 395 U.S. at 341-42.

As in *Goldberg* and *Sniadach*, then, the "crucial factor" of need pervades this case. Having been found initially eligible for unemployment compensation, the unemployment compensation recipient has by definition involuntarily lost his last job. Weeks may pass before he is able to find new work, especially in a period of widespread unemployment.[42] In light of the severe deprivation likely to be caused by a termination of benefits, a Referee hearing occurring many weeks or even months later is hardly likely to make the recipient whole. *See Nash* v. *Florida Industrial Commission*, 389 U.S. 235, 239 (1967).

C. The Complex Factual Nature of Unemployment Compensation Terminations Makes A Prior Hearing Particularly Necessary to Prevent the Termination of Benefits from Eligible Recipients.

A pre-termination due process hearing is essential "where recipients have challenged proposed terminations as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases." *Goldberg* v. *Kelly, supra,* 397 U.S. at 268. A sampling of the issues most frequently arising in unemployment compensation

[42]The Indiana seasonally adjusted unemployment rate averaged 5.6% in 1971. *See Annual Report, supra* at 19.

termination cases reveals that they usually involve interaction with third parties, and that they are, in the words of the court in *Crow* v. *California Department of Human Resources Development*, 325 F. Supp. 1314, 1316 (N.D. Cal. 1970), "pre-eminently factual": Did the recipient work for pay while drawing benefits? Was the recipient able to work? Was the recipient available for work? Did the recipient make an effort to secure work? Did the recipient register for work? Did the recipient receive and refuse an offer of work? If so, was the work "suitable"? *See* IND. ANN. STAT. §§52-1538a, 52-1538b, 52-1539a (Burns 1964 Repl., 1971 Supp.); §52-1540 (Burns 1964 Repl.).

The answer to each of the above questions frequently involves a subjective judgment of the character and honesty of recipients, the evaluation and interpretation of third party information, and the application of complex and evaluative legal standards to a matrix of disputable facts. In Mrs. Burney's case, for example, the issues of whether she "refused an offer of suitable work" under IND. ANN. STAT. §52-1539a (Burns 1964 Repl., 1971 Supp.), or was "unavailable for work" under IND. ANN. STAT. §52-1538b (Burns 1964 Repl., 1971 Supp.) required a determination of the availability of child care and public transportation after midnight, the safety of public transportation at that hour, Mrs. Burney's physical condition, her prospects of obtaining work

at other hours and her independent efforts to do so, and the relationship between her previous employment and the prospective job offer."[13] All of these issues are largely factual in nature; many can only be determined by reference to third party information.

Under such circumstances, an evidentiary hearing is essential if disputes concerning continued eligibility are to be accurately resolved. Otherwise the decision whether an unemployed worker may continue to receive unemployment benefits—a decision which may be of monumental importance to him and his family—is left to an often harried clerk who each week must process hundreds of recipients.

Under the Division's termination procedures at issue herein, recipients are afforded no advance notice of the basis for the termination and no opportunity to confront and cross-examine any of the outside sources whose information is vital to the resolution

[13]Under Indiana case law such questions as "availablity" must be determined in light of all the facts and circumstances surrounding a case. *See, e.g.*, Walton v. Wilhelm, 120 Ind. App. 218, 91 N.E. 2d 373 (1950); Gardner v. Review Board of Indiana Employment Security Division, 267 N.E. 2d 844 (Ind. App. Ct. 1971). Questions of child care, transportation and past conditions of employment are all factors to be considered in determining what is "suitable work." *See, e.g.*, Hacker v. Review Board of Indiana Employment Security Division, 271 N.E. 2d 191 (Ind. App. Ct. 1971); Renwanz v. Review Board of Indiana Employment Security Division, 267 N.E. 2d 844 (Ind. App. Ct. 1971). IND. ANN. STAT. §52-1539a(a) (Burns 1964 Repl., 1971 Supp.) provides the following standards for determining whether Mrs. Burney should have accepted the post-midnight job at the Melting Pot Restaurant:

> In determining whether or not any such work is suitable for an individual, the Division shall consider the degree of risk involved to such individual's health, safety, and morals, his physical fitness and prior training and experience, his length of unemployment and prospects for securing local work in his customary occupation, and the distance of the available work from his residence.

of the case. Instead, the accuracy of the termination process depends solely on the clerk's inclination, ability and time to seek out and judge relevant information, and on the ability of recipients who are frequently of limited education to marshal and articulate their case on the spur of the moment to an accusing Division official.

The Division's summary termination procedure has proved extremely inaccurate. During 1971, over *48 per cent* of all appealed Division decisions to terminate benefits were reversed at Referee hearings. *Significant Statistics, supra,* at 10. This figure far exceeds the reversal rate of 36 per cent in welfare fair hearings, which the district court in *Goldberg* described as a "startling statistic". *See Kelly* v. *Wyman,* 294 F. Supp. 893, 901 (S.D.N.Y. 1968)." *See also Crow* v. *California Department of Human Resources Development,* 325 F. Supp. 1314, 1318 (N.D. Cal. 1970). The unreliability of Indiana's summary procedure is resounding proof that, rather than being "niceties" (J.S. at 10), the procedures required by due process are essential to protect unemployed workers against arbitrary government action. Indeed, in cases of appealed terminations, the Division would

"As the Fifth Circuit stated in another context: "We do not abdicate our judicial role to statistics. But when figures speak, we must listen." Hall v. St. Helena Parish School Board, 417 F. 2d 801, 809 (5th Cir. 1969).

have achieved a similar degree of accurary merely by flipping a coin."[15]

D. The State's Interest in the Administration of the Unemployment Compensation Program Does Not Justify Summarily Terminating the Payment of Benefits Pending a Due Process Hearing.

Casés upholding summary procedures under the due process clause have been described as "emergency situations," *Bell* v. *Burson*, 402 U.S. 535, 542 (1971), or instances "where harm to the public is threatened." *R. A. Holman & Co.* v. *S.E.C.*, 299 F. 2d 127, 131 (D.C. Cir.), *cert. denied*, 370 U.S. 911 (1962)."[16] A review of the cases in which "emergency situations" justifying summary procedures were found to exist reveals that they bear no resemblance to the Division's interests allegedly existing in this case: *North American Cold Storage Co.* v. *Chicago*, 211 U.S. 306 (1908) (seizure of food not fit for human consumption); *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950) (seizure of mislabeled vitamin product); *Fahey* v. *Mallonee*, 332 U.S. 245 (1947) (conservatorship of insolvent savings and loan association); *Yakus* v. *United States*, 321 U.S. 414 (1944) (adoption of wartime price regulations); *Cafeteria*

[15] Compounding the problem, after summarily terminating recipients, the Division does not even afford them a prompt post-termination due process hearing. A recent survey indicates only 0.8% of all claimant appeals are decided within 30 days; only 3.9% are decided within 45 days; and only 17.7% are decided within 75 days. U.S. Dept. of Labor, Unemployment Insurance Statistics, Table 17a at 10 (Dec. 1971).

[16] In his concurring opinion in Sniadach v. Family Finance Corp., 395 U.S. 337, 343 (1969), Mr. Justice Harlan used the phrase "essential to protect a vital governmental interest."

& Restaurant Workers Union v. *McElroy*, 367 U.S. 886 (1961) (access to military installation).

The primary governmental interest advanced by the Division as justification for summarily terminating unemployment benefits is the desire to minimize administrative inconvenience. (J.S. at 10). In *Goldberg* v. *Kelly*, *supra*, 397 U.S. at 261, similar considerations were also urged to justify terminating benefits prior to a due process hearing. Despite the fact that substantial expenditures were involved, 397 U.S. at 266, this Court held that the factors of expense and administrative convenience did not justify denying a pre-termination hearing meeting the ordinary standards of due process. 397 U.S. at 261. As this Court stated:

> The interest of the eligible recipient in uninterrupted receipt of public assistance, coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens. 397 U.S. at 266.

Goldberg holds that the desire to minimize the expenditure of government funds does not, in any event, justify summarily terminating the payment of benefits. But it should be noted that the amount of expenditures necessitated by pre-termination hearings in the unemployment compensation system are mini-

mal in comparison to the amount of expenditures necessitated by pre-termination hearings in welfare. In welfare, any benefits wrongfully paid to recipients pending a due process hearing are likely to be unrecoverable, since welfare recipients "are likely to be judgment-proof." *Goldberg, supra,* 397 U.S. at 266. Unemployment compensation recipients, on the other hand, are by definition employable, IND. ANN. STAT. §52-1538b (Burns 1964 Repl., 1971 Supp.) and thus are likely to return to work in the future and accumulate sufficient funds to satisfy any debts owed to the Division because of an overpayment. The Division has ample means of recouping any overpayments that occur. If an overpayment is not voluntarily repaid, the Division can both offset the amount owed against any future benefits to which the recipient may become entitled (IND. ANN. STAT. §52-1537 (Burns 1964 Repl., 1971 Supp.))[11] and institute civil proceedings to recover the overpayment (IND. ANN. STAT. §52-1537(e) (Burns 1964 Repl., 1971 Supp.)). Criminal sanctions may also be imposed if a recipient makes a false statement or fails to disclose material facts. IND. ANN. STAT. §52-1559 (Burns 1964 Repl., 1971 Supp.). The striking ability of the Division to recover overpayments is revealed by its own statistics, which show that in 1971, approximately 72% of all overpayments made to ineligible recipients were recouped. *Annual Report, supra,*

[11] Offsetting overpayments against future benefits is a highly effective device since approximately 53% of all eligible claimants file more than one claim in the same benefit year. *See Significant Statistics, supra,* at 7.

at 34. *See also Crow* v. *California Department of Human Resources Development*, 325 F. Supp. 1314, 1317 (N.D. Cal. 1970).[48]

The Division has available additional means of reducing overpayments that do not entail terminating "sustaining funds"[49] of eligible recipients. As this Court pointed out in *Goldberg, supra*, 397 US. at 266:

> Much of the drain on fiscal and administrative resources can be reduced by developing procedures for prompt pre-termination hearings and by skillful use of personnel and facilities.

See Wheeler v. *Vermont*, 335 F. Supp. 856 (D. Vt. 1971) (three-judge court). By increasing the number of Referees, the Division could markedly reduce the current unreasonably long period[50] between the filing of an appeal and the issuance of a Referee's decision. Since the Division's administrative costs are reimbursed by the federal government[51] and may not be drawn from the Employment Security Fund, 42 U.S.C. §§503(a), 1103(c)(1), the hiring of additional Referees would have no effect on the amount of money available for the payment of benefits.

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[48]The relative cost of providing due process for unemployment compensation recipients must be assessed in light of the fact that on January 1, 1972, the Indiana Employment Security Fund contained a surplus of $310,220,000.00 despite a prolonged high level of unemployment. *Annual Report, supra*, at 27.

[49]*See* Nash v. Florida Industrial Commission, 389 U.S. 235, 239 (1967).

[50]*See* pp. 18-19, *supra*.

[51]*See Annual Report* at 1, 7.

In arguing that the requirement of prior due process hearings runs counter to the State's interest in minimizing administrative inconvenience, the Division ignores the many important governmental interests that are *advanced* by the payment of benefits pending a due process hearing. *See* pp. 10-17, *supra*. This Court's statement in *Goldberg*, *supra*, 397 U.S. at 265, in reference to welfare, applies equally well to unemployment compensation:

> The same governmental interests that counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it; pre-termination evidentiary hearings are indispensable to that end.

Finally, as again pointed out in *Goldberg*, the summary termination of benefits fosters the inaccurate resolution of disputed cases and thus is contrary to both the governmental and recipient interest in providing unemployment benefits to all eligible recipients:

> [A recipient's] need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from . . . bureaucracy. 397 U.S. at 264.

Without unemployment benefits, an *eligible* recipient may be seriously hampered in appealing his termination. Funds are necessary to enable the recipient to contact witnesses, gather evidence, and possibly

retain counsel to represent him at the hearing. Faced with the need to provide the necessities of life for himself and his family, the terminated recipient can scarcely devote the time and energy necessary to prosecute his appeal. *Cf.* Note, *Withdrawal of Public Assistance: The Right to a Prior Hearing*, 76 YALE L. J. 1234 (1967).[52]

III.

AN INFORMAL INTERVIEW DOES NOT SATISFY CONSTITUTIONAL REQUIREMENTS FOR A DUE PROCESS HEARING.

The Division urges that a pre-termination informal conference combined with a post-termination evidentiary hearing satisfies due process. However, in *Wheeler* v. *Montgomery*, 397 U.S. 280 (1970), the companion case to *Goldberg* v. *Kelly*, *supra*, this Court specifically rejected the view that if a recipient is afforded some of the elements of due process prior to the termination of benefits, his remaining due process rights can be satisfied in a subsequent hearing. In *Wheeler*, *supra*, 397 U.S. at 281-82, this Court held unconstitutional a pre-termination "informal" conference which was substantially identical to the procedure the Division urges should "be imposed in this case."[53] (J.S. at 9).

[52]Because of the severe financial pressure on recipients who have no source of income pending appeal, some eligible recipients may abandon appealed cases to accept substandard, menial employment. This would be contrary to the governmental and recipient interest in an employee's obtaining "substantially equivalent employment." Java, *supra*, 402 U.S. at 132.

[53]It should be mentioned that the welfare conferences in Wheeler v. Montgomery, 397 U.S. 280, 281 (1970), were preceded by three days advance notice of the proposed discontinuance.

In *Goldberg* v. *Kelly*, *supra*, 397 U.S. at 267-71, this Court described in detail the "minimum" procedural safeguards demanded by "rudimentary due process": (1) "timely and adequate notice detailing the reasons for a proposed termination," 397 U.S. at 267-68; (2) "an effective opportunity to defend by confronting any adverse witnesses," 397 U.S. at 268;" (3) "the right to be heard would be . . . of little avail if it did not comprehend the right to be heard by counsel," 397 U.S. at 270; (4) "the decision-maker's conclusion as to a recipient's eligibility must rest solely on the legal rules and evidence adduced at the hearing," 397 U.S. at 271; and (5) "of course, an impartial decision-maker is essential." *Id.*

In setting forth the "minimum" requirements for a due process hearing, the Court stated in *Goldberg*

"The Division refers to procedural safeguards such as confrontation and cross-examination as "niceties" (J.S. at 10). Yet in Goldberg, *supra*, 397 U.S. at 269, this Court pointed out that "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witness." The Court emphasized that confrontation and cross-examination were "minimum" elements of a due process hearing by quoting from Greene v. McElroy, 360 U.S. 474, 496 (1959) concerning the importance of the requirement:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination.

Mrs. Burney does not contend that heresay evidence is inadmissible in unemployment compensation termination proceedings or that the right to confrontation and cross-examination may never be waived. The *opportunity* for confrontation and cross-examination, however, is constitutionally mandatory. Goldberg v. Kelly, *supra*, 397 U.S. at 270.

that "the pre-termination hearing need not take the from of a judicial or quasi-judicial trial." 397 U.S. at 266. Mrs. Burney does *not* contend that she and her class are entitled to a "formal trial" (J.S. at 9). She does maintain, however, that unemployment compensation recipients are entitled to an administrative termination procedure which conforms to the flexible, "rudimentary" standards set forth in *Goldberg, supra.*

Notwithstanding the fact that *Goldberg* specifically holds that such elements as confrontation and cross-examination are "minimum" ingredients of a due process pre-termination hearing, the Division urges that a procedure for determining *initial* eligibility such as that utilized by California in *Java, supra,* 402 U.S. at 125-128, may properly be used for *terminating* the payment of unemployment benefits (J.S. at 9). In so doing, the Division ignores the critical distinction between procedures that can be used when eligibility for governmental benefits is *initially* being determined, and the procedures that constitutionally must be followed to divest an individual of a statutory entitlement that he previously has been enjoying. For example, a state may properly employ an *ex parte* procedure to determine whether an individual will be awarded a driver's license or placed on welfare. However, once a driver's license is issued or initial welfare eligibility is established, state action seeking to revoke the driver's license or terminate continued welfare eligibility must

conform to due process prior hearing requirements. *Bell* v. *Burson*, 402 U.S. 535 (1971); *Goldberg* v. *Kelly*, *supra*.

Nothing in this Court's opinion in *Java*, *supra*, supports the use of an *ex parte* process to terminate unemployment benefits. On the contrary, while *Java* did not reach the due process issue,[55] this Court's opinion fully supports the view that due process requires a full evidentiary hearing prior to the termination of unemployment benefits. In deciding the case on statutory grounds, the Court reviewed the issue of need in connection with the purposes of unemployment compensation, pointed out the "obvious" "importance of this case to workers,"[56] and stated:

> A kind of need is present in the statutory scheme for [unemployment] insurance . . . since unemployment benefits provide cash to a newly unemployed worker "at a time when otherwise he would have nothing to spend" serving to maintain the recipient at subsistence levels without the necessity of his turning to welfare or private charity. *Java*, *supra*, 402 U.S. at 130-32.[57]

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[55] *But see* Java, *supra*, 402 U.S. at 136 (Douglas, J.) (concurring opinion).

[56] 402 U.S. at 125.

[57] *See also* concurring opinion of Mr. Justice Douglas, Java, *supra*, 402 U.S. at 136. In holding that the termination of unemployment benefits prior to a full evidentiary hearing violated both due process and the Social Security Act, the three-judge district court in *Java* had stated:

> Defendants herein suggest that the unemployed person is perhaps not in such dire straits as the recipient of public assistance, in that he can always go on welfare, and thus save himself from absolute destitution. It is scant comfort to the disaster-stricken that there is someone, somewhere worse off than he, and this Court finds that the situation of the unemployed person herein is every bit as lamentable from the legal standpoint as that of the welfare client in Kelly v. Wyman and the garnishee in Sniadach v. Family Finance Corp. . . [citations omitted]. 317 F. Supp. 875, 878 (N.D. Cal. 1970).

Thus, *Java* not only fails to uphold the constitutionality of an informal conference as a means of terminating unemployment benefits, it strongly suggests that such terminations fall within the purview of *Goldberg* v. *Kelly, supra.*

CONCLUSION

In his concurring opinion in *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969), Mr. Justice Harlan pointed out that "notice and a prior hearing" are "the *usual* requisites of procedural due process." 395 U.S. at 342 (emphasis added). In *Goldberg, supra,* a prior due process hearing was recognized as essential to protect welfare recipients from the arbitrary termination of benetfis. While unemployment compensation and welfare bear striking resemblance to one another, Congress saw one basic distinction: Unlike welfare,[58] unemployment compensation was considered a worker's earned "contractual right"[59] to benefits which his labor helped to create.[60] In providing "subsistence" benefits to a worker "at a time when otherwise he would have nothing to

[58]Prior to *Goldberg*, welfare benefits were often considered to be a "gratuity." *See* Goldberg v. Kelly, *supra*, 397 U.S. at 261 n. 8; *cf. id.* at 271 (Black, J.) (dissenting opinion).

[59]Java, *supra*, 402 U.S. at 131-32; REPORT TO THE PRESIDENT OF THE COMMITTEE ON ECONOMIC SECURITY 13 (1935).

[60]"Even though the employers in the first instance pay the contribution . . . in the ultimate analysis it tends to rest upon the wage earner." Statement of Alvin H. Hansen, Chairman of Sub-Committee on Unemployment Insurance, Committee on Economic Security, *Hearings on S. 1130 Before the Sen. Comm. on Finance*, 74th Cong. 1st Sess. 447 (1935); *see* dialogue between Senator Black and Senator Wagner, *id.* at 25; dialogue between Senator Black and Frances Perkins, *id.* at 117-18; Note, *Charity versus Social Insurance In Unemployment Compensation Laws*, 73 YALE L. J. 357, 361 (1963).

spend,"[11] unemployment compensation serves the same purpose for the involuntarily unemployed as welfare serves for its beneficiaries. Surely due process and the Social Security Act provide unemployed workers with at least as much procedural protection as their counterparts in the public assistance programs.

The judgment below should be affirmed.

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Respectfully submitted,

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[11] Jones, *supra*, 402 U.S. at 131-32.